Supreme Court, U.S.
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No. 92-1478

IN THE SUPREME COURT OF THE

UNITED STATES

ROY L. WONDER et al.,

Petitioners,

vs.

LANRIC HYLAND,

Respondent.

BRIEF OF CALIFORNIA CITIES AMICUS CURIAE ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Pursuant to Rule 36.4 the California cities of Atherton, Alameda, Anaheim, Apple Valley, Atwater, Bellflower, Berkeley, Big Bear Lake, Brea, Burbank, Burlingame, Canyon Lake, Carlsbad, Cathedral

City, Chula Vista, Commerce, Costa Mesa, Dana Point, Del Rey Oaks, Dinuba, El Paso de Robles, Escondido, Eureka, Fairfield, Glendale, Grover Beach, Huron, Indio, La Mesa, Lomita, Long Beach, Los Altos, Marina, Milpitas, Monterey, Murietta, Nevada City, Oakland, Orange Cove, Oxnard, Pacifica, Palm Desert, Paramount, Pleasant Hill, Redding, Rialto, Rohnert Park, Rolling Hills Estates, Roseville, San Jose, San Pedro, San Rafael, San Juan Batista, San Luis Obispo, San Buenaventura, San Marcos, Santa Barbara, Santa Cruz, Santa Rosa, Santa Maria, Solana Beach, Sunnyvale, Temecula, Tiburon, Twentynine Palms, West Covina, and West Hollywood, ("Cities"), as authorized by their respective law officers set forth on the Appendix hereto, support as amicus curiae, the Petitioners Roy L. Wonder et al., for issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in the above-entitled case reported at 972 F.2d 1129 and attached as an Appendix to the Petition.

I.

INTEREST OF THE CITIES

The Cities named above are located throughout California and differ from one another in numerous respects. They all, however, share concerns similar to the City and County of San Francisco, the primary petitioner herein. Among those concerns is the necessity of delivering local government services with the use of volunteers on a regular and ad hoc basis. The extent to which such assistance can be used in the future by Cities in providing necessary services under severe budget restraints will be severely impacted if the decision below stands. Cities will focus herein on the broader implications of the Ninth Circuit's decision and its impact on a variety of local government functions.

II.

ARGUMENT

The factual background of the case is set forth at pages 6-9 of the Petition to which reference is made. Cities will not

repeat those facts here except to the extent necessary to support their arguments.

San Francisco took a chance by permitting a convicted felon, Respondent Lanric Hyland, to participate as a volunteer in its juvenile justice system. Hyland's rationale for service was his asserted experience with problems of juvenile incarceration and his desire to be pardoned by the Governor of California so that he could ultimately serve as a state peace officer. Hyland rewarded San Francisco's efforts toward his rehabilitation by attempting to disrupt its internal administrative-supervisory process in the form of a lengthy memorandum directed to the judges of the juvenile court over the head of his immediate superior. In that memorandum he urged termination of a managerial employee because of defects in San Francisco's juvenile hall operation which were a matter of public record.

Hyland's volunteer status was terminated by his superior and he was denied

further access to juvenile hall. Shortly thereafter, he obtained other employment in the same field and filed an action in District Court contending, among other things, that he had been deprived of property rights without due process and suffered retaliation for exercise of rights protected under the First Amendment.

In its decision, the Ninth Circuit did not base its decision on whether Hyland was a public employee. Indeed, it held that even if he was, the employment relationship was so tenuous that it did not rise to the level of a constitutionally protectable "property" interest. However, the Ninth Circuit also held that Hyland's memorandum had been an exercise of First Amendment rights and Petitioners had retaliated against him by removing him from his volunteer position.

Until this decision, loss of a volunteer position without pay or any related benefits would have been nonjudiciable in light of a long line of cases in

other circuits, many of which are cited at page 14 of the Petition. The Ninth Circuit has now created a new level of "property" in holding that the "opportunity to serve as a volunteer constitutes the type of governmental benefit or privilege, the deprivation of which can trigger First Amendment scrutiny." (Petition, App. 10).

The reasons for this conclusion are that a volunteer "gains valuable experience in education and public administration and can make professional contacts" and such service also "provides an individual the satisfaction of making a contribution, or giving something back, to society." (Petition, App. 11).

The decision of the Ninth Circuit is inherently contradictory in that it rejects the notion of a property right in a volunteer position and yet creates a new class of property that is protectable under the First Amendment. Moreover, this new class of property is so abstract and

amorphous as to be incapable of precise definition.

Violation of a Federally protected benefit necessarily implies that the nature and scope of that benefit is subject to rational analysis and definition. It has to be more than a mere unilateral expectation. Board of Regents v. Roth, 426 U.S. 564, 577 (1972).

There is a nexus between property rights protectable under the Due Process Clause of the Fourteenth Amendment and governmental benefits or privileges protectable against retaliation for exercise of First Amendment rights. In order for that benefit or privilege to exist sufficient to give it protection under the First Amendment it must be discernible to the extent that it can be defined in the same way that property has been defined under Board of Regents v. Roth, supra.

No such definition exists in the Ninth Circuit's decision and Cities respectfully suggest that a governmental benefit or

privilege must have at least the same level of entitlement as a job, a right to receive welfare payments or a license to engage in business activities in order to be protectable. No such certainty exists here, and if the decision is allowed to stand, it places Cities at considerable risk in operation of their volunteer programs.

All cities, to a greater or lesser extent, rely on volunteers to perform any number of governmental services relating to planning, land use, recreation, culture, long-range studies, intergovernmental relations, public safety review, and others too numerous to mention. In the Ninth Circuit's view, every one of those volunteers now has a "valuable" governmental privilege and may express views considerably at odds with the City's position or even destructive to the program. That person may now only be removed by engaging in the tedious and expensive process, which may include litigation, of scrutinizing the challenged

activities and balancing the individual's rights against the government's rights.

Any number of problems could arise if this ruling stands. As one example, suppose the residents of a city had adopted a growth management ordinance by a vote of the people to regulate land-use control (as is possible in California under state law), with the support of the entire elected city council. The city council then appoints a volunteer citizens' group to advise on the details of implementing that ordinance. Under the Ninth Circuit's decision, if one of those volunteers loudly opposed the entire concept of growth management, that person could not be removed without an exhaustive scrutiny and balancing. There would be nothing to prevent that individual from opposing the growth management program outside his/her status as a volunteer on the citizens' committee and he/she simply would not be able to do so under the imprimatur of a government-sponsored committee. Where is

the valuable benefit or privilege that the individual has lost?

Assume further, that this particular individual had vigorously opposed the growth management ordinance during the electoral campaign and thereafter requested the city council to appoint him/her to the committee for implementing the ordinance. Under the Ninth Circuit's decision, if the city council refused to appoint this individual on the grounds of previously-expressed views on a matter of public concern, he/she would be suffering deprivation of a valuable privilege.

The Ninth Circuit found in Manhattan Beach Police Officers Association v. City of Manhattan Beach, 881 F.2d 816, 819 (1989) that a failure to provide a desired assignment to a public employee in retaliation for exercise of First Amendment rights was protectable even though there was no loss of pay or benefits. In Manhattan Beach, the plaintiff was already a public employee and the desired assignment was at

least an element of employment status. In the hypothetical posed above, a citizen with no status at all could be forced onto the committee if the Ninth Circuit decision stands.

Taking this hypothetical one last step, if a candidate for mayor defeats another candidate in a fiercely contested election involving strongly contradictory political views of a city's future programs and that winning candidate thereafter forms a volunteer citizens' committee to assist him in implementing his campaign platform, his erstwhile opponent could make a claim to membership on that committee under the Ninth Circuit's decision.

The Ninth Circuit's characterization of Hyland as a "high-level" volunteer implies that where such a person is in a decisionmaking capacity or close to such capacity, his privilege or benefit is even more valuable and he is afforded greater First Amendment protection. This is completely in contradiction to this Court's

view, as expressed in Elrod v. Burns, 427 U.S. 347 (1976) and following cases, in which it is held that there is considerably greater latitude to make termination decisions with respect to public employees in decisionmaking or confidential capacities.

There are also numerous current examples of the problems created for the Cities by the Ninth Circuit's decision in this case. Most public zoos, museums, hospitals and libraries use volunteer services to a significant extent. A zoo could be sued for refusing to accept the services of volunteers who actively oppose the confinement of wild animals on philosophical grounds and seek their immediate release. Museums could be sued for failing to include on their volunteer staff persons who believe that museums should be abolished and all artifacts returned to their native habitat. Hospitals could be sued for refusing to include among their volunteers persons who actively (and sometimes violently) oppose certain forms of medical

research that may be conducted in those hospitals. Libraries could be sued for refusing to include on their staff volunteers who have expressed strong beliefs in the removal of certain materials from library stacks on the basis of religion, morals or politics.

Cities are currently suffering from significant budget shortages and a decline of local tax revenues. Over the years, to a greater or lesser extent, they have used volunteers to provide needed services without the financial or legal burdens that formal employment relationships entail. In addition, volunteer relationships have been used as a means of providing grass-roots citizen involvement and a fresh perspective on public issues.

This decision sends a message that it is unwise to use a volunteer program, especially in any controversial area or one subject to political debate, because it may be creating the equivalent of an unpaid civil service system and the significant

obligations that go with such a system. Cities will be especially deterred from "taking a chance" on an individual with a problematic background who might or might not perform adequately.

III.

CONCLUSION

For the reasons set forth above, Cities pray that this Court issue its writ of certiorari so that the issues described herein and in the Petition may be fully reviewed and determined for the guidance of all concerned.

DATED: April 2, 1993

Respectfully submitted,

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APPENDIX

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